Supreme Court, U.S.
FILED
051349 FEB 21 2006
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 2006

SHADI BANNA et al.,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

LARRY W. ZUKERMAN, Esq.
Counsel of Record

Zukerman, Daiker & Lear, CO., L.P.A.
2000 East 9th Street, Suite 700
Cleveland, Ohio 44115
(216) 696-0900
COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether or not it is error for a court of appeals to reverse a trial court's suppression order when such decision was based on factual determinations concerning the credibility of the witness that led to the trial court's conclusion that insufficient evidence and material misrepresentations contained within the warrant affidavit rendered invalid the warrant issued?

IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 2006

SHADI BANNA et al.,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

Petitioners, Shadi Banna and Ala Banna, pray that a Writ of Certiorari issue to review the judgement entry of the Court of Appeals of Ohio, Eighth Appellate District entered in the above-entitled on November 22, 2005.

LIST OF PARTIES

The parties to this proceeding include those listed in the caption as well as Ala Banna, who is also a Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS.. 3

STATEMENT OF THE CASE 4

REASONS FOR ALLOWANCE OF THE WRIT

I. It was error for the Eighth District Court of Appeals in Ohio to reverse the trial court's decision to suppress evidence in this case when such decision was based on factual determinations supporting a finding of insufficient evidence and material misrepresentations contained within the warrant affidavit which rendered the warrant issued invalid 7

CONCLUSION 13

APPENDIX 14

TABLE OF CITED AUTHORITIES

CASES

State v. George, 45 Ohio St.3d 325 (1989) 7, 9

State v. Reniff, 146 Ohio App.3d 749, 755-56 (2001) 7

State v. Bartless, 119 Ohio App. 483 (1964) 7

Illinois v. Gates, 462 U.S. 213 (1983) 7

Franks v. Delaware, 438 U.S. 145, 170 (1978) 9

U.S. v. Leon, 468 U.S. 897 (1984) .....
9

State v. Lloyd, 126 Ohio App.3d 95 (1998)
.....11

State v. Williams, 86 Ohio App.3d 41 (1993) 11

State v. OK Sun Bean, 13 Ohio App.3d 69 (1983) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend IV 7

STATUTORY PROVISIONS

Ohio Constitution Section 14 Article I 7

OPINIONS BELOW

The opinion in the Court of Appeals of Ohio, Eighth Appellate District, captioned State v. Banna, Cuyahoga App. No. 84901 and 84902 (May 26, 2005) is unreported and reprinted in the appendix. A Petition for Certiorari in the Supreme Court of Ohio was denied for lack of a substantial constitutional question. The order of the Supreme Court of Ohio declining jurisdiction and dismissing Petitioners' appeal is reported at 107 Ohio St.3d 1408 (2005).

JURISDICTIONAL STATEMENT

The trial court granted the Petitioners' Motion to Suppress on June 23, 2004. The State of Ohio appealed said trial court decision to the Court of Appeals of Ohio, Eighth Appellate District. On May 26, 2005 the Court of Appeals reversed the decision of the trial court. Petitioners filed a notice of appeal and memorandum in support of jurisdiction in the Ohio Supreme Court. On November 9, 2005 the Ohio Supreme Court dismissed Petitioners' appeal and declined jurisdiction to hear the case citing a lack of a substantial constitutional question.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

(A) The Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 4, 2003, Ala Banna, Rami Banna and Shadi Banna were named in a Nine (9) count indictment, alleging the following crimes for all three Defendants: 1) Drug Trafficking, with a juvenile specification, with an offense date of July 22, 2003, in violation of Ohio Revised Code (O.R.C.) 2925.03 and O.R.C. 2925.02 (BB)(Counts 1, 3, and 5); 2) Possession of Drugs, in violation of O.R.C. 2923.24 (Count 7). Moreover, Defendant Shadi Banna only was named in Counts 8 and 9 and charged with Drug Trafficking, with a juvenile specification, in violation of O.R.C. 2925.03 and O.R.C. 2925.01 (BB) with an offense date of July 13, 2003.

On July 18, 2003, Cuyahoga County Common Pleas Court Judge Nancy McDonnell issued a search warrant for the premises described as 1434 Ridgewood Drive, Lakewood, Cuyahoga County, Ohio. Judge McDonnell issued a warrant based on information contained in the affidavit of Patrol Officer Dave Carney of the Westlake Police Department Vice/Narcotics Unit. By way of two pre-trial motions, Appellant-Defendants moved the trial court to suppress all evidence seized pursuant to that warrant on the grounds that the warrant affidavit lacked probable cause and contained material misrepresentations, rendering said warrant invalid.

On June 23, 2004, the State of Ohio dismissed the charges against Rami Banna. Thereafter, on June 23, 2004 the trial court conducted a suppression hearing at which time the trial court granted Appellants' motion to suppress. In making this decision, the trial court indicated that it was

"troubled" by the affidavit's lack of indicia as to the reliability of the confidential informant. The trial court was further unconvinced in the reliability of the allegedly incriminating evidence in the affidavit which purported to link the suspected sales in these premises to defendant Shadi Banna, either through surveillance or through the controlled purchase. Finally, the trial court found the affidavit to be misleading because it purported that the informant was kept under constant surveillance during the controlled purchase when no such surveillance actually occurred.

The decision to suppress the evidence was based on the foregoing, and also in large part due to the trial court's determination that the State's primary witness lacked credibility. In summary of his decision to grant suppression, the trial court judge declared, "The officer testified that nothing was left out of the affidavit. We know that's not true. There is plenty left out." In regard to the threshold met by the affidavit, he stated, "the threshold is very low, we're talking about probable cause, more probable than not, what I find here is to be, at best, equivocal."

On June 6, 2005, the Court of Appeals of Ohio, Eighth District, Cuyahoga County, reversed and remanded the trial court's decision stating: "The affidavit contained ample evidence from which the issuing judge could find that there was a fair probability that contraband would be found at the subject premises." The Court of Appeals concluded that, "...neither the affiant's prior knowledge of the reliability of the informant nor the identity of Shadi Banna as the seller were important to the finding of probable cause to issue a search warrant..."

Finding the lack of connection between the Appellants and the alleged drug sales irrelevant for purposes of issuing a search warrant, and holding that a suppression would not be warranted even if the statements in the warrant